

Class Action Alert

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Ninth Circuit Takes a Bite Out of Kellogg Mini-Wheats Cereal Class Action Settlement

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The Ninth Circuit has taken yet another step to require a more exacting level of judicial scrutiny in consumer class action settlements. In *Dennis v. Kellogg Co.*, No. 11-55674 (July 13, 2012), Judge Trott, writing for the three-judge panel, reversed and vacated a multimillion dollar settlement of a class action brought by consumers allegedly misled by Kellogg's advertising for its Frosted Mini-Wheats cereal. The rejection of the settlement in *Dennis* may signal increasing difficulty in obtaining approval of consumer class settlements in courts of the Ninth Circuit.

The class action attacked Kellogg's ads that claimed that a clinical study had shown that a breakfast of Frosted Mini-Wheats helped improve children's attentiveness by nearly 20%.

Prior to class certification, the parties settled. The settlement provided that:

- Kellogg would establish a \$2.75 million fund to pay class members \$5 per box of cereal, up to \$15 per class member.
- Any remaining funds would be donated to charities chosen by the parties and approved by the court.
- Kellogg would distribute \$5.5 million worth of food to charities that feed the indigent.
- Kellogg would refrain for three years from ad claims like the ones attacked, but that it would still be allowed to claim that clinical studies showed that kids who ate a filling breakfast like Frosted Mini-Wheats are 11% more attentive in school than kids who skip breakfast.
- Kellogg agreed to pay class counsel attorneys' fees not to exceed \$2 million.

Two class members objected to the settlement, arguing that the *cy pres* relief would improperly benefit class counsel and Kellogg, not class members, because the distributions were too remote from class members and were not sufficiently related to the class members' unlawful competition and consumer law claims. The two class members also challenged the attorneys' fees award as excessive. The District Court approved the settlement and found the requested attorneys' fees fair and reasonable.

Although the Ninth Circuit Court reviewed the District Court's approval of the proposed class action for abuse of discretion, the Court noted that since the settlement was negotiated before the class was certified, the Court had to be "particularly vigilant not only for explicit collusion, but also for more subtle signs that class counsel have allowed pursuit of their own self-interests and that of certain class members to infect the negotiations."

Applying this heightened abuse of discretion standard, the Court held that the District Court abused its discretion in two ways in approving the settlement.

First, it was an abuse to approve *cy pres* awards to unnamed charities to feed indigents, since the charities were not necessarily limited and not necessarily related to the interests of the class members. The Court reasoned that

because “a *cy pres* award must qualify as ‘the next best distribution’ to giving the funds directly to class members[,]” there had to be “a driving nexus between the plaintiffs’ class and the *cy pres* beneficiaries.” According to the Court, since the gravamen of the lawsuit focused on Kellogg’s alleged false advertising, “appropriate *cy pres* recipients are not charities that feed the needy, but organizations dedicated to protecting consumers from, or redressing injuries caused by, false advertising.”

Second, the Court held that the District Court also abused its discretion when it approved attorneys’ fees of \$2 million, because the fees were excessive and unreasonable. In the Ninth Circuit, class action attorneys’ fees can be calculated on a lodestar method or a percentage of the common fund — with a 25% cap of the common fund as a guide. While the \$2 million fee was under 25% of the value of the \$10.64 million settlement, a cross-check of the award using the lodestar method showed that the fees were excessive. Class counsel had spent only 944.5 hours on the case and the settlement. Moreover, the Court was not impressed by the result, which, the Court concluded “yield[ed] little for the plaintiffs class.” Thus, the Court found the \$2 million fee award, which the Court calculated broke out to just over \$2100 per hour, was “extremely generous to counsel.” In light of the high amount of the fees, the District Court “needed to do more to assure itself ... that the amount awarded was not unreasonably excessive in light of the results achieved.”

The Ninth Circuit decision illustrates the increasing difficulty in settling consumer class actions. While the standard of review is an abuse of discretion, it is clear that consumer class action settlements (especially those settled before class certification) are being closely scrutinized — with an eye on the benefits to the class, the size of the attorneys’ fee award, and the use of *cy pres* awards.

Mintz Levin has a number of litigators who can advise on how best to structure class action settlements and guide clients through the increasingly difficult environment.

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